2022

The "Liberty of Silence" Challenging State Legislation that Strips Municipalities of Authority to Remove Confederate Monuments

Roger C. Hartley

THE "LIBERTY OF SILENCE" CHALLENGING STATE LEGISLATION THAT STRIPS MUNICIPALITIES OF AUTHORITY TO REMOVE CONFEDERATE MONUMENTS

Roger C. Hartley

ABSTRACT

There are roughly 700 Confederate monuments still standing in courthouse lawns, parks, and downtown squares in virtually every city, town, and village throughout the "Old South." Most of these Confederate monuments are located in states that have enacted legislation that bans the removal of Confederate monuments. Such legislative bans are in effect in Alabama, Georgia, Kentucky Mississippi, North Carolina, South Carolina, and Tennessee. Legislation that bans removal of Confederate monuments from public spaces poses a racial justice issue for millions of residents in these states because it forces political majorities in Southern communities (many constituting majority-minority communities) to host a Confederate monument that local residents view as racist.

Cities that would remove their local Confederate monument, but are precluded from doing so by state legislation banning such removal, have failed in their efforts to develop a successful litigation strategy to challenge the constitutionality of state monument removal bans. Such litigation efforts fail because lower courts interpret United States Supreme Court precedent to hold that a city does not possess any constitutional rights that it can enforce against its own state government. Unable to assert any constitutional right of its own, cities are not able to gain standing to challenge the constitutionality of state legislation that bans the removal of a city's Confederate monument. See, e.g., Alabama v. City of Birmingham, 299 So. 3d. 220 (Ala. 2019).

This article develops a constitutional theory that overcomes the main hurdle that has prevented local jurisdictions from successfully challenging state monument removal bans. The argument in this article is structured on the Constitution's coerced speech doctrine. The hurdles to effectively challenging state monument removal bans can be surmounted when cities combine with residents to jointly assert in litigation the residents' First Amendment right not to be coerced by state government into an unwanted association with a Confederate monument's objectionable pro-Confederate racist messaging. Through such litigation, a city's residents, with the assistance of their local government, are able to assert their "Liberty of Silence."

INTRODUCTION

Speech compulsion—the involuntary affirmation of or coerced association with an ideology with which one disagrees—is abhorrent to our notions of freedom of speech and conscience. For example, public schools no longer may lawfully punish a student for refusing to salute the flag or

pledge allegiance to the flag.[1] Nor may government compel a person to display state mottos located on automobile license plates or compel one to pay even small sums to support a despised ideological viewpoint.[2] The principle is straightforward: it is unconstitutional for the government to force persons "to be an instrument for fostering public adherence to [the government's] ideological point of view. . . ."[3] One's own "mind and conscience," rather than government coercion, should shape our beliefs and expressions.[4]

These are deeply-rooted constitutional values. As early as the late-1890s, courts acknowledged that Americans possess a "Liberty of Silence"—a reserved constitutionally guaranteed right to decide both "what to say and what not to say" and free choice to decide whether or not to associate with the beliefs of another.[5] We jealously guard against coercion to support some ideology that a ruling majority wishes to promote. We do this to protect each person's autonomy.[6] This "Liberty of Silence" is at the heart of the growing resistance to state laws that strip municipalities of their authority to remove Confederate monuments located on their public property.

A. *Voicing Opposition to Coerced Association with Confederate Monuments' Racist Messaging: The Case of Birmingham, Alabama*

In 1905, the United Daughters of the Confederacy (UDC) dedicated the Confederate Soldiers and Sailors Monument located in a park in Birmingham, Alabama. Both the monument and the park holding the monument are owned and maintained by the City of Birmingham. The State of Alabama provides no funds for their maintenance and upkeep.[7] The monument has several inscriptions that reference those who fought for the

---

1 W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 637, 642 (1943) (compelled affirmation of a belief violates the individual freedom of conscience).

2 Wooley v. Maynard, 430 U.S. 705, 713, 715 (1977) (license plates); Keller v. State Bar of Cal., 496 U.S. 1 (1990) (compulsion to pay state bar dues used for political purposes); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (same regarding compelled payment of union dues used for political purposes); Elrod v. Burns, 427 U.S. 347, 355 (1976) (compelled political contributions as a condition of public employment); *see also* Janus v. AFSCME, Council, 138 S. Ct. 2448 (2018) (compelled payments of union dues even when used exclusively for collective bargaining purposes).

3 *Wooley*, 430 U.S. at 715.

4 *Abood*, 431 U.S at 234–35.

5 *See* Wallace v. Ga., C. & N. Ry. Co., 22 S.E. 579, 579–80 (Ga. 1894); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988); *see also* discussion at Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).

6 Volokh, *supra* note 5, at 358.

7 *See* Alabama v. City of Birmingham, 299 So. 3d 220 (Ala. 2019).

Confederacy during the Civil War, one of which reads: "The manner of their death was the crowning glory of their lives."[8] This "crowning glory" that the monument celebrates was dying in support of a war "by a secessionist government waged against the United States to preserve white supremacy and the enslavement of four million African-Americans."[9]

Birmingham, with a population that is seventy-three percent African-American, is a majority-minority city whose mayor and city council are "elected by a majority-black local electorate." By contrast, the Alabama Legislature is "elected by a statewide majority-white electorate."[10] "It is undisputed that an overwhelming majority of the body politic of the city [of Birmingham] is repulsed by the [Confederate Soldiers and Sailors] Monument."[11] In 2017, Birmingham's democratically elected officials ordered that a twelve-foot-high freestanding plywood screen be built around the base of the monument. The screen obscured much of the monument's base and the monument's inscriptions.[12] By means of this plywood fence, Birmingham's political majority peacefully exercised its "Liberty of Silence" by symbolically disassociating itself with, and withholding its imprimatur to, the monument's pro-Confederate messaging.

Demographic, political, and economic transformations have "deepened the political chasm between . . . majority-minority cities and majority-controlled states."[13] One manifestation is that Birmingham's decision to dissociate itself from the messaging on its local Confederate monument is not unique: many other majority-minority localities throughout the South also are expressing their disgust with Confederate monuments' white supremacist ideology. The political majorities in these communities have exercised their own "Liberty of Silence" by supporting initiatives to

---

8 *Id.*

9 *Whose Heritage?: Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy (reporting the South's Civil War goal to destroy the Union and maintain in slavery nearly 4 million persons) [hereinafter *2019 Whose Heritage*].

10 *See* Lewis v. Governor of Ala., 944 F.3d 1287, 1294 (11th Cir. 2019). In many of the municipalities where these monuments are located, African American political influence is on the rise, and residents, Black and White, aspire for their Southern communities to be identified as inclusive and welcoming diversity. For example, in October, 2019, Steven Reed was elected as the first African American mayor of Montgomery, Alabama, the state's capital and also the first capital of the Confederacy early in the Civil. According the U.S. Census, approximately 60 percent of Montgomery's 200,000 residents are black or African American. Eric Levenson & Steve Almasy, *Montgomery, Alabama Elects its First Black Mayor*, CNN(Oct. 9, 2019), https://www.cnn.com/2019/10/08/us/montgomery-alabama-black-mayor/index.html.

11 Alabama v. City of Birmingham, No. CV 117-903426-MGG (Ala. Jefferson Cty. Cir. Ct., Jan. 14, 2019) (opinion by Graffeo, J.).

12 *See City of Birmingham*, 299 So. 3d at 223.

13 Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 382 (2019).

remove Confederate monuments located in public spaces that the locality controls. Hundreds of Confederate monuments were erected in the South, most of them by the United Daughters of the Confederacy, during the two-decade period of 1895 to 1915—the apex of Jim Crow segregation and its wave of repression against the South's African American community.[14] "By the 1890s hardly a [Southern] city square, town green, or even some one-horse cross-roads lacked a Civil War memorial of some kind,"[15] These relatively recent local initiatives to remove the South's Confederate monuments from public land have precipitated a white conservative backlash. Alabama is one of seven Southern states whose conservative white majorities, which control state politics, have enacted legislation designed to silence the local protest against Confederate monuments by banning removal or alteration of the state's Confederate monuments.[16]

B. *Litigation to Force the Removal of the Screen Obscuring Birmingham's Confederate Monument*

In the summer of 2017, the State of Alabama initiated litigation in an Alabama circuit court seeking a judgment declaring that Birmingham's placement of the plywood screen around its Confederate monument violated the recently adopted Alabama Memorial Protection Act of 2017.[17] The circuit court rejected the State of Alabama's claim on constitutional grounds. In an unprecedented procedural ruling, the circuit court held that a municipality has standing to sue its own state government for violating the *municipality's individual free speech rights*, and, on the merits, declared Alabama's Memorial Preservation Act unconstitutional. The circuit court concluded that Alabama's Memorial Protection Act impermissibly denied Birmingham "its right to government speech" by "forcing the City to speak"

---

14 *See* discussion at ROGER C. HARTLEY, MONUMENTAL HARM: RECKONING WITH JIM CROW ERA CONFEDERATE MONUMENTS 53-91 (2021).

15 David W. Blight, *Decoration Days: The Origins of Memorial Day in North and South*, THE MEMORY OF THE CIVIL WAR IN AMERICAN CULTURE, 105 (Alice Fahs and Joan Waugh, eds., 2004); *see also* W. FITZHUGH BRUNDAGE, THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY 25–27, 42 (2005) (detailing the spread of Confederate monuments in the late-nineteenth and early-twentieth centuries); CAROLINE E. JANNEY, BURYING THE DEAD BUT NOT THE PAST: LADIES MEMORIAL ASSOCIATIONS & THE LOST CAUSE 102–03, 106 (2008) (showing how Confederate memorialization moved from mourning the death of Confederate soldiers "into a more celebratory stage" following the death of Robert E. Lee in 1870).

16 *See infra* notes 37–42 and accompanying text for a discussion of the monument removal bans that have been enacted in seven Southern states.

17 Alabama Memorial Preservation Act of 2017, ALA. CODE § 41-9-232 (2021). The State also asked the court to impose a $25,000 fine for each day the memorial remains "altered" or "otherwise disturbed" within the meaning of the Act. *See City of Birmingham*, 299 So. 3d at 223–24.

a message it did not wish to convey, in violation of its right to free speech.[18] The trial court reasoned that it would be unacceptable for courts to conclude that municipalities such as Birmingham do not possess a First Amendment free speech right to resist being forced to speak the state's ideological message. Otherwise, "[t]he Act [banning monument removal would [render] pro-Confederate speech immune from local political processes that reject the message of white supremacy [and] African-American inferiority."[19] Yishai Blank has offered an insightful political interpretation of the circuit court's reasoning:[20]

> [S]tructurally, minorities who are able to take control of local government and express themselves through them, will always be exposed to the [statewide white] majority's preemptive power. [G]ranting cities First Amendment rights against their state would adequately protect minorities, who are often able to express their opposition most effectively through their democratically elected officials.

Alabama appealed the circuit court's decision, and in November 2019 the Alabama Supreme Court reversed the circuit court. On appeal, the State of Alabama maintained, and the Alabama Supreme Court agreed, that the trial court erred when it concluded that Birmingham, or any other municipality, possesses its own constitutional right to free speech enforceable against its state government.[21] The Alabama Supreme Court acknowledged that municipalities possess a right of "government speech."[22] But the "government speech" doctrine is a powerful *shield* against First Amendment claims that are advanced by dissenting citizens.[23] The government speech doctrine does not provide cities a *sword* to attack silencing measures imposed on them and their residents by their own states. Quoting the United States Supreme Court's decision in *Williams v. Mayor & City Council of Baltimore,*[24] the Alabama Supreme Court concluded that "'a municipal corporation, created by a state for the better ordering of government, has no

---

18 *See id.* at 227–29 (discussion by the Alabama Supreme Court of the circuit court's opinion).

19 *Id.* at 227–28.

20 Blank, *supra* note 13, at 396.

21 *City of Birmingham*, 299 So. 3d at 225.

22 *See*, *e.g.*, Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 481–83 (2009).

23 For example, when government speaks using a forum the government itself created that is not open to the public, such as a city's own web site, an individual cannot claim a First Amendment right to equal access. Moreover, a taxpayer cannot claim that she was compelled to speak because she funds [a government's] expressions through her tax money. *See* Yishai Blank, *supra* note 13, at 438–39.

24 Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933) (citing, *inter alia*, Trenton v. New Jersey, 262 U.S. 182 (1923)).

privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator'"[25] The Alabama Supreme Court concluded that nothing in the United States Supreme Court's government speech cases, or any other authority, supports the conclusion that a local government's ability to engage in expression confers on that government entity any of the rights and protections included in the Free Speech Clause of the First Amendment.[26]

C. *The Roads Not Taken: Alternative Approaches*

By arguing that municipalities possess their own First Amendment free speech rights, Birmingham's brief to the Alabama Supreme Court advanced what charitably might be called an ambitious litigation strategy, albeit one that gained the circuit court's endorsement.[27] One obstacle to the success of such a litigation strategy is that the United States Supreme Court has never endorsed the view that municipalities possess constitutional free speech rights enforceable against their own state governments.[28] Moreover, the language of the Constitution cautions against deploying a litigation strategy whose efficacy depends on establishing that Birmingham possessed its own First-Amendment-based free speech rights. The free speech rights enforceable against the States derive from the Fourteenth Amendment's Due Process Clause.[29] That clause provides that "[n]o State shall . . . deprive any *person* of life, liberty or property, without due process of law." Thus, Birmingham's litigation strategy depended on unprecedented success in persuading a court to find that a municipality is a "person" on whom the Fourteenth Amendment was intended to confer free-speech protection from state regulation. And with respect to the so-called "government speech"

---

25 Alabama v. City of Birmingham, 299 So. 3d 220, 228 (Ala. 2019).

26 *Id.* at 228–29.

27 *See* Brief for Appellees at 12, Alabama v. City of Birmingham, 299 So. 3d 220 (Ala. 2019) (No. 1180342).

28 *See* Yishai Blank, *supra* note 20, at 371 (stating that "the Supreme Court has never explicitly ruled on the question of whether cities are entitled to First Amendment protection against their own states, nor has any federal court of appeals authoritatively done so."). Supreme Court precedent strongly suggests that neither the federal government nor the states possess free speech rights derived from the First Amendment. *See* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n. 7 (1973) (Stewart J., concurring) (stating that the Constitution confers free speech rights protecting individuals *from* governmental interference, but it "confers no analogous protection on the Government"); Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 944–45 (W.D. Va. 2001) (stating that the Constitution "protects only citizens' speech rights from government regulation, and does not apply to government speech itself"); Blank, *supra* note 13, at 371–72.

29 It was not until 1925 that the Supreme Court held that the free speech rights in the First Amendment, applicable to the federal government, were incorporated into the Due Process Clause of the Fourteenth Amendment and were thereby made applicable to state and local governments. *See generally* Gitlow v. New York, 268 U.S. 652 (1925).

doctrine, the Alabama Supreme Court was correct that a local government's right to engage in "government speech" does not support the conclusion that municipalities possess individual free speech rights enforceable against their own state governments.[30] Finally, Birmingham's litigation strategy, which was dependent on a court finding that the City of Birmingham possessed its own free speech rights enforceable against the State of Alabama, flew in the face of the quote from the United States Supreme Court's decision in *Williams v. Mayor & City Council of Baltimore*, cited above, that a municipality is a creature of the state and accordingly has "no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."[31] Indeed, *Williams* was just one of a line of cases advancing that view, beginning with the early-twentieth century case of *Hunter v. Pittsburgh*.[32]

There were alternative doctrinal pathways available to Birmingham, or to any other locality desiring to resist being forced to "speak" a state's preferred pro-Confederate message when barred from removing a Confederate monument from the locality's public property by legislation enacted by a white-majority controlled state legislature.[33] But before examining those alternative pathways, it is useful to back up a bit. Initially, it is helpful to understand why so many strongly believe that a locality's political majority should retain the autonomy to decide whether to remove its Confederate monument. What are the moral and practical claims for the preservation of such autonomy? Part I below provides this background discussion. Understanding what is at stake when a state monument removal ban precludes a locality's residents from achieving the removal of a Confederate monument by directing political pressure on their elected local representatives helps clarify why state monument removal bans violate the free speech rights of local residents, which is the focus of Part II.

---

30 *See, e.g.*, Blank, *supra* note 13 (concluding that "the government speech doctrine protects various municipal expressions against private dissenters, [but] leaves cities unarmed against silencing measures by their own states."). *Accord* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (stating that when government engages in its own expression "then the Free Speech Clause has no application. . . . [I]t does not regulate government speech." (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005)).

31 Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933).

32 207 U.S. 161, 178-79 (1907) (holding that "[t]he number, nature, and duration of the powers conferred upon [municipal] corporations . . . rests in the absolute discretion of the state . . . unrestrained by any provision of the Constitution of the United States.").

33 *See* discussion *infra* notes 119–142 and accompanying text.

I. THE CASE FOR LOCAL AUTONOMY TO CHOOSE WHETHER TO HOST A CONFEDERATE MONUMENT

A. *The National Movement to Remove Confederate Monuments and State Preemptive Legislation Impeding Those Efforts.*

The Southern Poverty Law Center (SPLC) has surveyed and cataloged Confederate monuments in the United States. As of July 2020, the total number of Confederate monuments placed on public property was calculated to be approximately 770. More than ninety percent of these monuments were originally erected in the thirteen states comprising the Confederacy and the two border states of Kentucky and Missouri, and of this original number of Confederate monuments, more than 300 were erected in three states: Georgia, Virginia, or North Carolina.[34]

Following Dylann Roof's 2015 massacre of nine African American worshipers at the Mother Emanuel A.M.E. Church in Charleston, South Carolina, a movement grew to remove Confederate memorialization from public display—mostly battle flags and Confederate monuments. As part of this monument removal movement, Charlottesville, Virginia's City Counsel in 2017 proposed relocating the equestrian statue of Robert E. Lee located in a Charlottesville park. To protest this proposed relocation, heavily armed white supremacist/neo-Nazi activists descended on Charlottesville on Saturday, August 12, 2017. Their "Unite the Right" rally devolved into a race riot as the rally participants displayed Confederate battle flags, brandished swastikas, and spewed white supremacist, racist, and anti-Semitic rhetoric. One "Unite the Right" rally participant, James Fields, an avowed white supremacist, deliberately accelerated his car into a group protesting against racism, killing Heather Heyer and injuring more than two dozen others.[35]

---

34 *Whose Heritage?: Public Symbols of the Confederacy*, S. POVERTY L. CTR., (2016), https://www.splcenter.org/20160421/whose-heritage-public-symbols-confederacy. That total was revised upward in June 2018 and then revised upward again in February 2019 and the estimate as of late-June, 2020 was that 766 Confederate monuments had been erected in the United States. *See 2019 Whose Heritage*, *supra* note 9; *Whose Heritage: Public Symbols of the Confederacy*, S. POVERTY L. CTR. (June 4, 2018), https://www.splcenter.org/20180604/whose-heritage-public-symbols-confederacy#findings.

35 Fields was sentenced to life in prison plus 419 years. This punishment was in addition to a life sentence previously imposed on him following a conviction on twenty-nine federal hate crime charges. *See* Associated Press, *Man In Charlottesville Car Attack Gets Life Sentence Plus 419 Years*, HUFF. POST (July 15, 2019), https://www.huffpost.com/entry/fields-sentence-charlottesville-rally_n_5d2cbce0e4b08938b09917fe; *see also* Matt Thompson, *The Hoods Are Off*, THE ATLANTIC (Aug. 12, 2017), https://www.theatlantic.com/national/archive/2017/08/the-hoods-are-off/536694/; Stephen F. Hayes, *Where are Trumps "Very Fine People*"?, THE WKLY. STAND. (Aug. 17, 2017), http://www.weeklystandard.com/hayes-where-are-trumps-very-fine-people/article/2009330.

Following these events in Charlottesville, the Confederate monument removal effort intensified. As of June 2020, SPLC data shows that 59 of the approximately 770 Confederate monuments in existence as of the Charleston massacre had been removed, leaving roughly 710 still standing as of mid-2020.[36]

B. *State Bans on the Removal of Confederate Monuments*

Confederate monument removal has been thwarted in seven states as a result of legislation that bans or effectively blocks the removal of Confederate monuments. In addition to Alabama's Monument Protection Act, discussed above, statutory bans or significant impediments are in place in Georgia,[37] Kentucky,[38] Mississippi,[39] North Carolina,[40] South Carolina[41]

---

36 *See 2019 Whose Heritage*, *supra* note 9 (tab denominated "Removal Since Charleston"). This report, located on the internet, is dated 2019 but states that it is updated regularly as more information of monument removals is obtained. Police killed George Floyd on May 25, 2020 precipitating nationwide Black-Lives-Matter protests. At least twenty-three Confederate monuments were removed between Memorial Day, 2020 and the end of June, 2020. *See* Bonnie Berkowitz & Adrian Blanco, *A Record Number of Confederate Monuments Fell in 2020, But Hundreds Still Stand. Here's Where.*, WASH. POST (last updated Mar. 12, 2021), https://www.washingtonpost.com/graphics/2020/national/confederate-monuments/.

37 Description of state flag; militia to carry flag; defacing public monuments; obstruction of Stone Mountain, GA. CODE § 50-3-1(b)(2) (2018) (ban on the removal, relocation, defacing or altering any publicly owned monument or memorial dedicated to honor, or recount the military service of, any past or present military personnel).

38 Kentucky Military Heritage Act, 2002 Ky. Acts 299, 299 (codified as amended at KY. REV. STAT. ANN. § 171.780B.788 (2002) (barring removal of monuments designated as a military heritage site and option of local governments to lodge applications for rescission of that such designation of a monument but only upon the unanimous vote of the Kentucky Military Heritage Commission).

39 Mississippi Military Protection Act, 2004 Miss. Laws 496 (codified as amended at MISS. CODE ANN. § 55-15-81 (2004)) (describing monuments, including Confederate monuments, that may not be "relocated, removed, disturbed, altered, renamed or rededicated" but permitting localities to "move the memorial to a more suitable location if it is determined that the location is more appropriate to displaying the monument").

40 North Carolina Heritage Protection Act, N. C. GEN. STAT. § 100-2.1(b) (2015) (providing what with minor exceptions, a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission. *See* Kasi I. Wahlers, *North Carolina's: Cementing Confederate Monuments in North Carolinas Landscape*, 94 N.C.L. REV. 2176 (2016) (explaining that in North Carolina, Confederate monuments owned by the state and located on public property may not be relocated except under limited circumstances and then only with the concurrence of the North Carolina Historical Commission).

41 South Carolina Heritage Act, S.C. CODE ANN. §10-1-165 (2018) (banning removal of monuments erected in remembrance of the "War Between the States" and requiring a two-thirds vote of the legislature to repeal the legislation). In May 2021, the South Carolina Supreme Court heard arguments challenging South Carolina's "Heritage Act" on a variety of constitutional and-state-law-based theories. *See* Rosen Hagood, *What's Next for S.C. Heritage Act?* ROSEN HAGOOD (May 27, 2021), https://rosenhagood.com/blog/whats-next-for-sc-heritage-act. In September 2021, the South Carolina Supreme Court ruled that the South Carolina Heritage Act is legal under state law but struck down that portion of the legislation requiring a two-thirds supermajority of the General Assembly to remove a

and Tennessee.[42] In three states, Alabama, Georgia, and South Carolina, state legislation creates an absolute bar to disturbing in any way certain categories of war memorials, which include Confederate monuments. These states are listed below in Table 1 with an "A" in the column "Type Ban" to indicate an absolute ban. In the other states (delineated with a "C" to indicate a conditional ban), the bans ostensibly are conditional in the sense that waivers can be sought from certain state commissions. But, as Table 1 below shows, even in such "C" states, very few monuments have been removed.

TABLE 1

CONFEDERATE MONUMENTS IN STATES THAT BAN REMOVAL				
State	**Type of Ban**	**Number of Monuments As of 2016**	**Removals Since Charleston (To June 1, 2020)**	**Remaining Monuments As of June 1, 2020**
Alabama	A	58	0	58
Georgia	A	112	3	109
Kentucky	C	23	3	20
Mississippi	C	52	0	52
North Carolina	C	95	6	89
South Carolina	A	58	0	58
Tennessee	C	43	5	38
Virginia	A	105	2	103*
Total (w/o Va.)		441	17	424

Source: Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy* (2019).

*Virginia's ban was repealed in 2020, effective July 1, 2020. The calculation of monuments subject to a removal ban does not include Virginia's monuments.

---

historical monument or statue or rename it because the supermajority rule restricts the General Assembly's legislative power in violation of the South Carolina constitution. Pinckney v. Peeler, 862 S.E.2d 906 (S.C. 2021).

42 Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412 (2019) (providing that Confederate memorials "located on, public property, may [not] be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered"). Virginia also banned Confederate monument removal, but in early 2020 the Virginia legislature repealed the ban, effective July 1, 2020. *See* Andrea Cambron & Michelle Basch, *Confederate Group Decides to Remove Alexandria Statue Early* (June 2, 2020, 4:34 PM), https://wtop.com/alexandria/2020/06/confederate-group-decides-to-remove-alexandria-statue-early/. Accordingly, in July 2021, the City of Charlottesville, Virginia was finally able to remove the Robert E. Lee statute, whose proposed removal had precipitated the 2017 "Unite the Right" riot. *See* Caroline Vakil, *Charlottesville to Take Down Robert E. Lee Statue on Saturday*, THE HILL (July 9, 2021, 1:38 PM), https://thehill.com/blogs/blog-briefing-room/news/562286-charlottesville-to-take-down-robert-e-lee-statue-on-saturday.

Waivers usually require super-majority votes of the commission members—two-thirds or even unanimous votes. Accordingly, waiver provisions that are contained in state legislation banning monument removal create a false impression that the bans provide meaningful local autonomy to decide whether to keep or remove a locality's Confederate monument.[43]

Table 1 highlights the adverse impact of state removal bans on localities' ability to remove their Confederate monuments. As noted above, of the approximately 770 Confederate monuments SPLC has identified throughout the United States, about 60 had been removed as of May 2020—though only 17 in the seven states that currently have bans on monument removal. In round numbers, roughly 710 Confederate monuments remain and Table I shows that about 60 percent of these are concentrated in the seven states that legislatively ban monument removal—424 of the remaining 710 monuments. Progress in removing Confederate monuments will be seriously impeded as long as these state bans on monument removal remain beyond the reach of judicial challenge.

C. *The Moral and Pragmatic Claims by Southern Communities for Autonomy to Decide Whether to Remove their Confederate Monuments*

I have detailed elsewhere, and in substantial detail, the strong moral and pragmatic case supporting a local community's claim for autonomy to decide whether to remove their Confederate monuments, even in the face of protests that such removal disrespects Southern heritage.[44] It is beyond the scope of this essay to delineate all the specifics of that argument.

In brief, the most evident reality of a Confederate monument is that it distorts history in ways that are demeaning to African Americans. These monuments transmit, explicitly or symbolically, the widely debunked "Lost Cause" myth that the Civil War had nothing to do with the South's attempt to preserve the institution of slavery, and, in any event, slavery was a beneficial institution for those enslaved. The Lost Cause myth maintains that those held in chattel slavery were a happy and faithful lot; they were treated well and had far better lives because they had been rescued from the savagery

---

43 *See, e.g.*, Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412 (2019) (waiver available only upon a two-thirds vote of the commission members); Kentucky Military Heritage Act, 2002 Ky. Acts 299, 299 (codified as amended at KY. REV. STAT. ANN. 171.780B.788) (recission of a designation that bars monument removal requires a unanimous vote of the Kentucky Military Heritage Commission).

44 *See* ROGER C. HARTLEY, MONUMENTAL HARM: RECKONING WITH JIM CROW ERA CONFEDERATE MONUMENTS (2021).

of Africa and converted to Christianity.[45] According to the Lost Cause myth, rather than being a fight over slavery, the Civil War was a philosophical disagreement among honorable white men, North and South, who disagreed with respect to the constitutional question of each State's reserved right to secede from the Union.[46] Southerners who fought for the Confederacy, it is argued, were honorable patriotic men fighting in a righteous cause of resisting Yankee aggression imposed by the North to deny Southerners their constitutional liberties.[47] Implicitly or explicitly, every Confederate monument transmits this ideology of honorable men advancing this righteous Confederate cause.[48]

Post-war Confederate veterans concocted the tenets of the Lost Cause myth with various motivations. But this much is clear: the vanquished ex-Confederates yearned that posterity provide them heroic recognition. Yet, they feared that unless the South controlled the Civil War's historical narrative, Southerners were at great risk of being viewed as brave but dishonorable traitors who had failed in their illegal attempt to overthrow the Union and who would be scorned for having caused such prodigious suffering and death for no better purpose than to preserve their slave property and expand slavery into the Western territories.[49]

---

45 *See, e.g.*, discussion at PAUL FINKELMAN, DEFENDING SLAVERY: PRO-SLAVERY THOUGHT IN THE OLD SOUTH: A BRIEF HISTORY WITH DOCUMENTS 11, 39, 160 (2003).

46 DELL UPTON, WHAT CAN AND CAN'T BE SAID: RACE UPLIFT AND MONUMENT BUILDING IN THE CONFEDERATE SOUTH 18, 31-32 (2015) (showing that the early-twentieth-century Confederate memorial landscape was dedicated to "recast[ing] the war as a violent contest among white men over high political principles having nothing to do with slavery").

47 For a contemporary restatement of this "Lost Cause" myth and its various representations of history from the point of view of a one who advocates that the Lost Cause myth is grounded in historical fact, see LOCHLAINN SEABROOK, CONFEDERATE MONUMENTS: WHY EVERY AMERICAN SHOULD HONOR CONFERATE SOLDIERS AND THEIR MEMORIALS (2018).

48 There are dozens of examples of inscriptions on Confederate monuments that extol the righteousness of the Confederate cause. Here are some typical examples. The Confederate monument located in Montgomery County, Maryland prior to its removal stated: "To Our Heroes of Montgomery Co. Maryland That We Through Life May Not Forget to Love The Thin Gray Line." *See* Mikaela LeFrak, *Montgomery County Moves Confederate Statue From Rockville To Private Land*, AMERICAN UNIVERSITY RADIO (July 25, 2017), https://wamu.org/story/17/07/25/montgomery-county-moves-confederate-statue-private-land/. Lochlainn Seabrook has assembled the following Confederate monument inscriptions that praise the Confederate cause: 1) By "dy[ing] in the performance of their duty [they] have glorified a fallen cause;" to those "Who glorified their righteous cause and who made the Sacrifice supreme;" the monument tells "The story of the glory Of the men who wore the gray"; and "no brighter land had a cause so grand." *See* SEABROOK, *supra* note 47, at 92, 129, 378, 386.

49 *See, e.g.*, GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH 14, 22-26, 49, 117-18 (1987); Alan T. Nolan, *The Anatomy of the Myth*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 11-34 (Gary W. Gallagher and Alan T. Nolan, eds., 2000).

For decades, dozens of America's most able Civil War historians have combed the historical record and they agree overwhelmingly that the Lost Cause myth, which every Confederate monument transmits, is built on false history. The transcending cause of the Civil War was the South's desire to preserve, and expand, the institution of slavery and thereby preserve the privileges of white supremacy that the slave system provided.[50] Moreover, mountains of evidence substantiate that slavery was not a benign institution. Most Southern states enacted slave codes, concluding that they were needed to control the several million humans in bondage. Thousands of slaves attempted to escape bondage prior to the Civil War. Once Union troops arrived in the South during the Civil War, tens of thousands of enslaved people crossed into Union lines at the first opportunity in order to escape slavery.[51] It is pure fantasy to claim that slaves were happy with their condition and uniformly faithful to their kind masters who treated them like family. Notwithstanding representations of the happy and faithful slave found in the myth of the Lost Cause and symbolically transmitted through Confederate monuments, the overwhelming evidence demonstrates that slavery was cruel. It separated black families, it exploited black labor, and it was able to endure only through enforcement measures that combined the whip, intimidation, and murder.[52] White-on-black rape as a form of "social and sexual control" of slaves was commonplace.[53] In short, the myth of the Lost Cause is built on a distortion of history. By symbolically propagating the tenets of the Lost Cause myth, Confederate monuments are complicit in distorting the true nature of white-black relations during slavery. Built by white supremacists, Confederate monuments are designed to contrive *false positive attitudes* favorable to those in the South who prosecuted the Civil War in a vain attempt to destroy the Union and keep four million men and women in bondage.

---

50 *See, e.g.*, CYNTHIA MILLS, *Introduction*, *in* MONUMENTS TO THE LOST CAUSE: WOMEN, ART, AND THE LANDSCAPES OF SOUTHERN MEMORY 15-20 (Cynthia Mills & Pamela H. Simpson, eds., 2003) (showing that denial of slavery as a cause of the Civil War was central to the "Southern apologia"); KIRK SAVAGE, STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND MONUMENT IN NINETEENTH CENTURY AMERICA 129 (1997) (detailing the rapidity that Southerners repudiated slavery following the Civil War and "wr[ote] it out of their history of the war [and] a massive and deliberate process of collective forgetting took place . . . ."); *id.* (showing that secessionist leaders themselves cited the preservation of slavery as the reason to fight for Southern independence "and the same reasoning was repeated in press, pulpit, and school . . . until virtually the end of the war").

51 *See* EDWARD H. BONEKEMPER III, THE MYTH OF THE LOST CAUSE 14–15, 255–56 (2015); Bruce Levine, THE FALL OF THE HOUSE OF DIXIE: THE CIVIL WAR AND THE SOCIAL REVOLUTION THAT TRANSFORMED THE SOUTH 14–15, 255–56 (2013).

52 For an insight into the brutalities needed to maintain order among plantation slaves, see W.J. CASH, THE MIND OF THE SOUTH 83 (1941).

53 *See* JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 43 & n. 28 (3rd ed. 2014).

But the case for removing Confederate monuments from public spaces that they have occupied for more than one-hundred years transcends their misrepresentation of history and contribution to shaping false positive attitudes about those who attempted to preserve and expand the institution of slavery. For, in addition, those who erected Confederate monuments were self-consciously motivated by a desire to deploy Confederate monuments to sustain, and duplicate as much as possible, the white supremacy that dominated antebellum Southern society.

Caroline Janney has extensively studied Confederate memorialization efforts. Her research demonstrates that soon after Appomattox, Southern white women used Confederate memorialization events as opportunities for "tens of thousands of white southerners, rich and poor, to perpetuate a sense of latent Confederate nationalism [committed to] sustain[ing] a sense of Confederate pride and white Southern solidarity. . . ."[54] Women, mostly elite women from families that traditionally had ruled the South, self-consciously joined Confederate memorialization groups "so that they might continue to express their Confederate patriotism through memorial activities [that allowed] them to [inculcate] a sense of [racial] solidarity among white ex-Confederates."[55] The goal of this ideological commitment to Confederate nationalism was to forestall the advance of racial equality in the South's postwar social and political culture. Secession was abandoned, but Confederate nationalists did not abandon the values of white supremacy that were the underpinnings of the "Old South." The ongoing commitment to Confederate nationalism after Appomattox had "profound implications for Southern identity" well into the nineteenth century, and continues even today. Advocates identified themselves as a distinct cultural group, especially the United Daughters of the Confederacy (UDC), the group most responsible for erecting the Jim-Crow-era Confederate monuments beginning in the late-nineteenth century. The UDC membership in most communities was composed of mostly elite Anglo-Saxon women who were the daughters and granddaughters of the Southern gentry. The UDC raised these monuments in the late-nineteenth and early-twentieth century as an integral aspect of efforts by the South's ruling class to inflict physical, economic, psychological, and political harm on the African American community, all in an effort to maintain a racial order that entrenched the social and political position of their own class and relegated the former slaves to a condition of inferiority and social "otherness."[56]

---

54 JANNEY, BURYING THE DEAD, *supra* note 15, at 13–14.

55 *Id.* at 41, 99. *Accord* CAROLINE E. JANNEY, REMEMBERING THE CIVIL WAR: REUNION AND THE LIMITS OF RECONCILIATION 136, 152–54 (2013).

56 There is a wealth of historical evidence substantiating these white supremacist motives of the UDC for building Confederate monuments. Among the best are BRUNDAGE, *supra* note 15, at 25–27, 42,

Christopher Knight, art critic for the Los Angeles Times, encapsulated the research of several generations of academic historians when he commented on the June 2020 removal of the Confederate monument located in Alexandria, Virginia.[57] Knight writes: the bronze figure of a standing Confederate soldier was

> a racist civic sculpture celebrating white supremacy. . . . Memorial sculptures like this one have a specific purpose. They cast institutional racism in bronze. [These Confederate monuments were] erected . . . to tell white [Southerners] that they might have lost the Civil War, but they still held the reins of power. And [they] told black [Southerners], in no uncertain terms, to know their place. . . . Intimidation was one objective of every such sculpture or plaque, the assertion of white privilege another. . . . Art is not supposed to be cruel, never mind a sickness. Confederate monuments are both. The only legitimate moral response to the growing iconoclasm toward them is: Good riddance. But there is more. Confederate monuments were not only hurtful when they were erected, but they continue to insult and marginalize and attack the dignity of every African American neighbor of ours today who must pass by one of these monuments located in her community as she goes about her daily business. African Americans who live in communities that continue to sponsor a Confederate monument are forced to internalize the bitter reality that by hosting the local Confederate monument, their community chooses to praise those who fought to keep their ancestors in slavery. To be sure, Confederate monuments honor the valor and steadfastness of the rank-and-file soldier in the South

28–31, 36–41, 117–20 (2005); KAREN L. COX, DIXIE'S DAUGHTERS: THE UNITED DAUGHTERS OF THE CONFEDERACY AND THE PRESERVATION OF CONFEDERATE CULTURE 6 (2003); JANNEY, BURYING THE DEAD, *supra* note 15, at 173-75; Janney, REMEMBERING THE CIVIL WAR, *supra* note 55, at 269.

Mitch Landrieu, the former mayor of New Orleans, has explained how cultural and social elites during the era of Jim Crow segregation deployed Confederate monuments in New Orleans as a means to maintain their political position centered on the ideology of white supremacy. Landrieu states that Confederate monuments never reflected what the true society of New Orleans, generations ago, actually felt when they were built. "The structures reflected what the people who erected them, mostly ex-Confederate soldiers or sympathizers, believed because they had the power to build them and because they wanted to send a particular political message. They cast a dark and repressive shadow over my city and, in a way, held us back." MITCH LANDRIEU, IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY 34 (2018).

57 Christopher Knight, *Commentary: Confederate Monuments Institutionalize Racism. Take Them All Down. Now*, L.A. TIMES (June 4, 2020, 6:00 AM), https://www.latimes.com/entertainment-arts/story/2020-06-04/confederate-monuments-birmingham-alexandria-richmond.

> who died during the Civil War. But every Confederate monument, sometime explicitly but always at least symbolically, also celebrates the "Lost Cause" for which that Confederate soldier died. And therein is the source of so much pain for those whose ancestors would have been forced to remain in chattel bondage had the South and the Confederacy's racist cause prevailed in the Civil War.[58]

In addition, Confederate monuments harm the very communities that host them when those communities are working to shake off their histories of racial injustice and project an authentic image of inclusiveness. A community that genuinely wishes to be inclusive, and to be viewed as such, subverts those aspirations by continuing to sponsor a Confederate monument on its public landscape. A standing white Confederate soldier image in a town square can misrepresent the community's current racial attitudes and undermine a locality's goal of projecting itself as a community that welcomes and promotes racial diversity. New Orleans is one example of this. A leading reason that New Orleans removed its Confederate monuments was that they "had stolen the identity of New Orleans" and misrepresented the racial attitudes of contemporary New Orleans and its current residents.[59]

Finally, and most profoundly, many conclude that Confederate monuments must be removed because they contribute to contemporary institutional racism. This view rests on two conclusions: that institutional racism exists in contemporary America and that Confederate monuments contribute to it.

The most pervasive form of racial discrimination in the United States is what Professor Joe R. Feagin calls "implicit bias," defined as the persistence of assumptions of white superiority and negative racist stereotypes, all of which shape our ideas about race. "Whites tend to think about [African Americans], consciously or unconsciously, in terms of racist stereotypes or other racial framing inherited from the past and constantly reiterated and reinforced in the present."[60] Feagin has documented this implicit bias across virtually the entire landscape of contemporary American life: employment, policing, driving, finance, housing, voting, etc. The evidence of its

---

58 *See* JAMES FORMAN, JR., Driving Dixie Down, *Removing the Confederate Flag from Southern State Capitols*, *in* CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH 210 (J. Michael Martinez, William D. Richardson, & Ron McNinch-Su, eds., 2000) (relating Yale law professor Forman's unsuccessful attempt to rid his mind of the pain of the state-sponsored bigotry he experienced as a high school student in Georgia, whose state flag, then consisting of the Confederate battle flag, generated in Forman's mind images the Ku Klux Klan, brutality against African Americans, denial of the right to vote, and bigotry).

59 *See* discussion at LANDRIEU, *supra* note 56, at 171, 178–79.

60 JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 144–46 (3rd ed. 2014).

persistence is overwhelming.[61] Moreover, Jennifer L. Eberhardt has documented how the South's physical environment continues to support attitudes of black inferiority today.[62] Professor Dell Upton's research demonstrates how Confederate monuments were designed to transmit, and still transmit, the message that "[i]n the New South, blacks would be relegated . . . to a permanent, nonpolitical underclass, a compliant labor force for an industrialized urban region."[63] Professor Michelle Alexander describes a "New Jim Crow" evidenced by the mass incarceration of African Americans, mostly African American youth, and demonstrates that this phenomenon is explained by the persistence of racial framing of black males as dangerous.[64] Eberhardt describes what she refers to as the contemporary "black-crime association"—the cultural stereotype of black males' capacity to do harm.[65] And historian Henry Louis Gates explains how this "black-crime association" has roots in nineteenth and early-twentieth-century imagery that created the stereotype of the "nature of black people," their "natural propensity" as dangerous and criminally-inclined and the "nagging staying power and inertia of racist stereotypes." Gates describes how these stereotypes "continue to 'do work' within our psychological and subterranean racial landscape."[66]

Confederate monuments' contribution to the persistence of this "implicit bias" is readily demonstrable. I have assembled that evidence in detail in other published work.[67] For present purposes two avenues of causation warrant discussion here. First, seemingly benign, and often artistically appealing, Confederate monuments operate to promote contemporary racial harm by their effect of dehumanizing Southern African Americans and ostracizing them from Southern civic life, thereby inspiring Southern whites to self-consciously identify their whiteness with the very existence of a civilized society.[68] Confederate monuments' symbolic message of white superiority emanates from the proliferation of the hundreds of white faces, and the absence of black faces, in the nineteenth- and early-twentieth-century Confederate monuments. The message symbolically proclaimed by the hundreds of these monuments of white standing soldiers

---

61 *See id.*

62 *See* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 166, 171 (2019).

63 UPTON, *supra* note 46, at 18.

64 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

65 EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE, s*upra* note 62, at 60–66, 81.

66 *See* HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 94, 129–30, 141 (2019).

67 *See* HARTLEY, *supra* note 44, at 92–129.

68 *See* SAVAGE, *supra* note 50.

in Southern town squares and courthouse lawns was, and still is, that white skin represents valor and steadfast commitment to the community's welfare and black skin represents the opposite.

A second avenue of causation between Confederate monuments and contemporary negative stereotyping of the African American community is described by W. Fitzhugh Brundage in his book, *The Southern Past: A Clash of Race and Memory*.[69] Brundage's emphasis is the contribution of Confederate monuments to the effort by the conservative Southern white political majority to erase, at least to attempt to erase, black Civil War and post-Civil War history. Brundage shows that Southern elites raised Confederate monuments to shape a particular view of public history that purged from the recalled historical narrative anything that contradicted the white supremacist collective memory of the Civil War and its consequences that the elite wished to construct. A transcending Southern myopia developed—a blindness to vast portions of the landscape of Southern history that does not conform to the Jim Crow perspective of white superiority and black inferiority. Brundage demonstrates that this myopia has impeded many Southerners' ability to fathom any Southern racial order other than the one dominated by white supremacy. Lack of recognition, understanding, and appreciation, indeed even acknowledgment, of African American institutions and history relegated much of the African American community to "the margins of American life."[70]

II. FREE-SPEECH-BASED DOCTRINE FOR CHALLENGING STATE STATUTORY BANS ON MONUMENT REMOVAL

The "Liberty of Silence" is an umbrella concept that incorporates several related strands of First Amendment doctrine, all of which are designed to provide protection from government efforts to compel speech and unwanted association with some government-approved ideology. Eugene Volokh is the leading authority on the subject of compelled speech.[71] Volokh persuasively argues that compelled speech is best understood by recognizing that the doctrine "actually contains two separate strands (each of which in turn contains some substrands)."[72]

---

69 *See generally* BRUNDAGE, *supra* note 15.

70 BRUNDAGE, *supra* note 15, at 57, 107, 115–16, 121–22.

71 *See, e.g.*, Volokh, *supra* note 5; William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018).

72 Volokh, *supra* note 5, at 358. The following discussion of the various strands of the compelled speech doctrine has benefitted enormously from Professor Volokh's detailed analysis of compelled speech.

Some speech compulsions *restrict speech* in the sense that the compulsions affect "the complaining speaker's own message." In other words, speakers are unable to create precisely the speech that the speaker desires. This can occur by government "selectively penalizing certain speech" by compelling the speaker to include unwanted material in the speech. An example is when a newspaper editor is required to include certain material in response to what the newspaper has chosen to include in its speech. Or, government might interfere with a speaker's ability to convey precisely the message desired as when a parade organizer is required to include unwanted participants in its parade.[73]

Other government compulsions are "pure speech compulsions." Here, the government intrusion leaves the speaker free to create the speech she wants to create, but in other ways government "unduly intrudes on the compelled person's autonomy."[74] Examples are the compulsion to salute the flag, carry the government's slogan on an automobile license plate, or finance the unwanted speech of another.

State legislation that forces a locality against its will to host the pro-Confederate message contained in a Confederate monument violates each of these strands of the compelled speech doctrine.

A. *The unconstitutionality of compelling a municipality's political majority to include an unwanted pro-Confederate message in their municipality's speech*

Government unconstitutionally imposes "a form of tax on certain kinds of speech" when government forces speakers to add certain speech by others to their speech thus barring speakers from communicating "just the content that they want [their speech] to contain."[75] Three cases well-illuminate the principle. In *Miami Herald Publishing Co. v. Tornillo*,[76] the Court concluded that it was unconstitutional to require newspapers to publish replies to criticisms of candidates. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[77] the plurality concluded that it was unconstitutional to require utilities to periodically turn over space in its mailing envelope to groups that disagree with the its views. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,[78] the Court

---

73 *See id.* at 360, 364, 368.

74 *Id.* at 358, 368–69.

75 *See* Volokh, *supra* note 5, at 359–60.

76 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

77 Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1 (1986).

78 Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557 (1995).

ruled unconstitutional a requirement in a state public accommodations statute that required a parade to include a gay-themed float.

Miami Herald and *Pacific Gas* are somewhat compromised as particularly useful precedent for challenging state laws that ban Confederate monument removal because the "tax" government placed on the speech in those cases (requiring a newspaper to publish replies to criticisms of political candidates and requiring a public utility to add an insert to its mailing envelopes) arose only because the speakers in those cases chose to speak *particular content*. The concern was that the "tax" would either deter the speaker from communicating the desired expressive content or would impel the speaker to add a response.[79] Confederate monument removal bans are different. States require localities to host a Confederate monument's pro-Confederate message whether or not the locality itself chooses to convey any particular message (or any message). Accordingly, unlike *Miami Herald* or *Pacific Gas*, banning the removal of a Confederate monument is not a tax on a municipality's *past* speech. Nor do these removal bans pose a risk of deterring a municipality from exercising future speech out of concern that such future speech will itself then be "taxed."

Miami Herald and *Pacific Gas* nevertheless are useful in understanding how best to structure an attack on state bans on monument removal because in those cases the Court was not only concerned with government taxing speech but, in addition, expressed an underlying concern that the compelled speech requirement at issue denied speakers the choice to "creat[e] the particular speech products they want[ed] to create."[80] This "substrand" of the compelled speech doctrine has been referred to as a "message-diluting or message-adulterating compelled-speech obligation."[81] In other words, government is requiring a speaker to alter the expressive content of her speech. *Hurley*, the parade case, highlighted this First Amendment concern over denying speakers the autonomy to create just the type of speech they want. In *Hurley*, a requirement in a state public accommodations statute required a parade to include a gay-themed float. This compulsion was found to be unconstitutional because the regulation "interfered with the ability of the 'private speaker to shape its expression by [choosing to speak] on one subject while remaining silent on another.'"[82]

---

79 *See* Volokh, *supra* note 5, at 360 (observing that in *Miami Herald* the duty to provide reply space or time was "'triggered by [past] speech of [a] particular content'" and this is the "classic example:" exacting a penalty as a consequence of the content of the speaker's past speech thus making the "triggering speech more expensive, and thus deter it. . . .").

80 *Id.* at 362.

81 Clay Calvert, *Wither Zauderer, Blossom Heightened Scrutiny? How the Supreme Court's 2018 Rulings in* Becerra *and* Janus *Exacerbate Problems with Compelled-Speech Jurisprudence*, 76 WASH. & LEE L. REV. 1395, 1408 (2019).

82 Volokh, *supra* note 5, at 362 n. 45 (quoting *Hurley*, 515 U.S. at 574–75).

Riley v. National Federation of the Blind of North Carolina, Inc.[83] is another example of speech compulsion that coerces speakers to add something to their speech, thus precluding speakers from structuring their speech exactly as they desire. In *Riley*, the Court invalidated a requirement that charities include certain disclosures in their fund-raising solicitations. As with *Hurley*, the principle was that government may not compel speakers to include in *their* speech the speech of another. As the Court has explained, citing *Riley*, "[b]y compelling individuals to speak a particular message [of another], such [compulsions] 'alter[] the content of [the speaker's own] speech.'"[84]

Miami Herald, *Pacific Gas*, *Hurley*, and *Riley* differ factually in one important way from suits challenging the constitutionality of state legislation that bars a municipality from removing its Confederate monument. In each of the above-cited cases, a discrete single act of speaking triggered the government's act of speech compulsion—the publication of specific content in a newspaper, holding a particular parade, or a discrete fund-raising solicitation. But for that discrete speech act, there would not have been any government compulsion. As discussed above, state bans on the removal of Confederate monuments located on public land compel a locality to sponsor unwanted speech at all times, not just in response to some discrete speech act by the municipality. This factual distinction would appear to weaken the above-cited cases as precedent for challenging monument removal bans.

However, *National Institute of Family & Life Advocates (NIFLA) v. Becerra*[85] has significantly modified and expanded the compelled speech doctrine by eliminating any discrete speech act prerequisite. In *NIFLA*, state law required anti-abortion pregnancy crisis centers to post notices informing patients about the availability of free or low-cost abortions. This posting requirement was not triggered by any single speech act by the center. The Court ruled that the posting requirement constituted unconstitutional compelled speech, notwithstanding the absence of any specific precipitating speech act by the pregnancy center. Rather, as Eugene Volokh has explained:[86]

> *NIFLA* applied [the compelled speech doctrine] more broadly, holding that even the aggregate of all the information that a woman gets from a pregnancy counseling clinic can itself be a single unit of "speech," so that the

---

83 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988).

84 Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361, 2371 (2018) (citing *Riley*, 487 U.S. at 795).

85 *See generally id.*

86 Volokh, *supra* note 5, at 362–63.

> government generally cannot require speakers to add extra communications to it. . . . [U]nlike the disclosure in *Riley*, [the speech compulsion] didn't have to be [triggered by] any specific conversation. . . . The clinics' "speech" thus seemed to refer to the aggregate content of all the speech that the patrons received from the clinics. . . .

NIFLA thus made clear that the prohibition on content regulation when government compels individuals to speak a particular message of another applies both to cases where the speaker engages in a single discrete speech act and also to cases where the "speech" entails the aggregate of all the information that one receives from a speaker. *NIFLA* is the bridge that permits the application of the compelled speech doctrine to state legislation banning removal of Confederate monuments.

For a variety of reasons, a majority of the residents of a Southern community may want to project to the outside world, through an aggregate of their speech as voiced for them by their elected community leaders, that their community is one that genuinely wishes to be racially inclusive, and to be viewed as such. Perhaps the locality needs to shake off its own history of racial injustice. Often, the white business community and the majority of residents who control local government elections share a goal of communicating, through an aggregate of their speech, that the locality is a deracialized Southern community that is a good place for corporate relocation and other business investment. The preferred theme of this aggregate message may be rebirth, citing as an example the slogan adopted by the city of Atlanta, Georgia: "The City Too Busy to Hate."[87] In short, for a variety of reasons the residents of a municipality in the South may have invested considerable time, effort, and money in projecting what they hope will be understood as an authentic image of inclusiveness and welcoming diversity. Such a community and its residents will reasonably conclude that being forced to continue to host in its town square an image of a white Confederate standing soldier guarding the community and celebrating the "Lost Cause" effort to maintain slavery thwarts the community's residents' ability to create the particular speech product that they desire.

In *NIFLA*, state law required pregnancy-related clinics to post a notice stating the availability of publicly-funded family-planning services, including the availability of low-cost abortions. But, as the Court pointed out in *NIFLA*, "[a]bortion [was] the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the . . . notice plainly alters the content

---

87 *See* UPTON, *supra* note 46, at 18–19.

of petitioners' speech."[88] The same altering of the content of speech results when the residents of a Southern community attempt to escape a history of past support for white supremacy but are required by state law to continue to host a Confederate monument that celebrates an ideological cause built on white supremacy. In other words, a ban on the removal of a locality's Confederate monument requires the residents of a community to support the ideology of white supremacy when white supremacy is "the very practice that [the community's residents] are devoted to opposing." A Confederate monument removal ban thus alters the content of speech of the residents of a Southern community wishing to reject the racism of the past, no less so than requiring a pregnancy crisis clinic that opposes abortion to inform the public where low-cost abortions are available.

But the monument removal ban is even more speech-content altering than was the compulsion in *NIFLA*. Nobody was likely to be misled that, by posting the required government notices, the pregnancy center, which opposes abortion, in fact supports abortion. However, the public might well conclude that the residents of a Southern community have *voluntarily* chosen to direct local officials to continue to host the town's Confederate monument. In that case the public might well discount as hypocrisy the aggregate of the residents' speech which is claiming that the city or town is now inclusive and welcomes diversity.

The reality is that location matters. A "public position [for a civic monument] serve[s] clearly to identify the community with [the] monument."[89] Sponsors want monuments placed in a public space, rather than on private land, in order to generate the impression that a local community agrees with the message that the monument communicates. Indeed, gaining the benefit of government endorsement of the monument's message is the whole point of securing a public space for the monument's location. Otherwise, why not simply erect the monument on private land?[90] It is widely understood that a local community legitimates the monument's messages "merely by virtue of its being the [government] that is offering them [with the result that opposing views] will be denied legitimacy [and] marginalized."[91]

The political majority of every local community has the moral right and pragmatic justification to insist that it retain control over how it presents itself

---

88 *NIFLA*, 138 S. Ct. at 2371.

89 *See* Daniel J. Sherman, *Art, Commerce, and the Production of Memory in France after World War I*, *in* COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY 186, 190 (John R. Gillis ed., 1994).

90 *See id.* (concluding that location matters because "a public position [for a civic monument] serve[s] clearly to identify the community with [the] monument").

91 Sanford Levinson, *Silencing the Past: Public Monuments and the Tutelary State*, 16 PHIL. & PUB. POL'Y QUARTERLY 6, 7 (1996).

to the outside world. This includes resisting coercion to sponsor a racist message on its community's public land and thus being involuntarily associated with some detested message.[92] The Supreme Court has acknowledged that "[g]overnments have always used public monuments to express a government message [of its own choosing], and members of the public understand this."[93] The public associates government with a monument's message whether the monument is government-commissioned or is a "privately financed and donated monument that the government accepts and displays to the public on government land."[94] In either case, in the public mind a monument's message represents the government's viewpoint when government permits a monument to be placed on land it controls.

In short, political majorities that oppose Confederate monuments object when a state monument removal ban forces their local government to lend a community's endorsement to the pro-Confederate messages that a Confederate monument transmits. Forcing a community to sponsor a pro-Confederate message at a time when the aggregate of the public message of a community's political majority is the renunciation of white supremacy not only alters the content of the aggregate of residents' speech: *it completely undermines that content* and denies those comprising a political majority in a locality the ability to "creat[e] the particular coherent speech product they want to create."[95] Thus, as a content regulation of speech, the compulsion to maintain a Confederate monument must surmount strict judicial scrutiny. In other words, the ban on removing a Confederate monument must be necessary to advance a compelling state interest and be narrowly tailored, meaning that the state government must carry the burden of showing that it has no less drastic means to advance its interest other than the statutory ban the state has imposed.[96]

---

92 *See, e.g.*, Walker v. Texas Div., Sons of Confederate Veterans, Inc.*,* 576 U.S. 200, 212–13 (2015) (explaining that a Confederate heritage organization prefers that Texas place its private message, containing a Confederate battle flag symbol, on a Texas specialty license plate rather than having the message placed on a bumper sticker next to the license plate in order to gain government's endorsement and explaining that Texas has the right to reject such a demand by the heritage organization on the grounds that the design is "offensive" and Texas may choose not to be associated with this offensive symbol). *See also id.* at 228 (Alito, J., dissenting) (stating that "governments have long used monuments as a means of expressing a government message [and] long experience has led the public to associate public monuments with government speech.").

93 *Id.* at 229 (Alito, J., dissenting).

94 Pleasant Grove City v. Summum, 555 U.S. 460, 470–71 (2009).

95 Volokh, *supra* note 5, at 368.

96 Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (stating that "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to [the most] rigorous scrutiny."); *see* Reed v. Town of Gilbert, 576 US 155, 171 (2015) (holding that "content-based restrictions on speech . . .

B. *Pure Speech Compulsions: Government Intrusions that Unduly Interfere with a Speaker's Autonomy*

In addition, monument removal bans constitute unconstitutional "pure speech compulsions." A "pure speech compulsion" is a compulsion to "make or display or create [or support though association] a stand-alone statement" that the government prefers.[97] While not restricting speech, these compulsions compel one to engage in unwanted speech and thereby intrude on one's personal autonomy.

West Virginia State Board of Education v. Barnette[98] and *Wooley v. Maynard*[99] are the paradigmatic examples of unconstitutional "pure speech compulsions." *Barnette* banned a "compulsion . . . to declare a belief [in the values inherent in the American flag since it] violated the individual freedom of mind."[100] *Wooley* concluded that a state's insistence that one publicize a state slogan on an automobile license plate unconstitutionally "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[101]

Both *Barnette* and *Wooley* would appear to be strong precedent for successfully challenging a state ban on Confederate monument removal except that in each case the state's invasion of the "sphere of intellect and spirit" arose from a compulsion of the individual to participate in some *overt individual act* that disseminates the government's ideological message. That overt act was either to salute the flag and pledge allegiance as in *Barnette* or, as in *Wooley*, "to be an instrument for fostering public adherence to an ideological point of view [one] finds unacceptable by being require[d] . . . [to] use [one's] private property as a 'mobile billboard' for the State's ideological message."[102] Indeed, the Court made this point in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*.[103] In *FAIR*, the Court distinguished *Wooley* from a requirement that law schools permit military recruiters to speak on campus, explaining that in *Wooley* but not in

---

can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'").

97 Volokh, *supra* note 5, at 368.

98 *See generally* 319 U.S. 624, 642 (1943) (compelled flag salute and pledge of allegiance violates the individual freedom of conscience).

99 *See generally* 430 U.S. 705, 717 (1977) (compulsion to carry the state's motto on one's automobile license place violates the individual freedom of conscience).

100 *Barnette*, 319 U.S. at 631–33, 637.

101 *Wooley*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 642).

102 *Id.*

103 *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR), 547 U.S. 47, 70 (2006).

FAIR, the government compelled citizens to "personally speak the government's message."[104]

State bans on removal of Confederate monuments invade personal autonomy but not by requiring a speaker to "personally speak the government's message." These bans invade the "intellect and spirit" due to forced association—the compulsion to host, and thus be associated with, a Confederate monument's white supremacist pro-Confederate message and, perhaps, the risk that the community and its residents will be misunderstood as endorsing the Confederate monument's viewpoint. The oppression arises from government compulsion that a city's residents support, and be associated with, a racist Confederate message.

While *Barnette* and *Wooley* do not focus on the compulsion to associate with, and perhaps be misunderstood as endorsing, some detested ideology, the Court's forced-funding cases demonstrate the unconstitutionality of coerced association with an opposed ideology. Sometimes the government compels people to pay money to support viewpoints they oppose and thereby compel support for a despised ideology. Among the best examples of unconstitutional forced association are compelled contributions to a political party as a condition of employment,[105] compelled payments of fees to public employee unions to be used for political purposes,[106] and compelled payments to state bar associations used for political purposes.[107] The rationalizing principle of these cases is that the Constitution "prohibit[s] a State from compelling any individual to . . . associate with a political party [or cause]."[108]

State bans on removing a community's local Confederate monument violate this non-association principle. By forcing the political majority of local residents, which objects to a Confederate monument's pro-Confederate ideology, to host a Confederate monument, a state monument removal ban compels a community's political majority to continue to associate with, and *be associated with*, an ideological viewpoint that it finds abhorrent.

However, not all compelled hosting of the speech of another is unconstitutional: the Court has upheld some compelled hosting but only in *limited circumstances* not present when state law bans Confederate monument removal. Compelled hosting by the Government is constitutional but only if (1) the Government's compulsion creates "no danger of

---

104 *Id.* at 63.

105 *See* Elrod v. Burns, 427 U.S. 347, 372–73 (1976).

106 *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977). *See also* Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018) (compelled payments of union dues unconstitutional even when used exclusively for collective bargaining purposes).

107 *See* Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990).

108 *Abood*, 431 U.S. at 234–35.

"governmental discrimination for or against a particular message,"[109] (2) there is no risk that the "complaining speaker's own message [is] affected by the speech it [is] forced to accommodate,"[110] and (3) there is no "likelihood that the views [expressed as a result of the compelled hosting] would be identified with [those who are forced to host that speech]."[111] This latter concern is that compelled hosting creates the risk that viewers will falsely conclude that the compelled entity has endorsed the view that the entity is compelled to host.

Compelling a local community's political majority to host a Confederate monument against its will violates *all three* of the above prerequisites for upholding the constitutionality of compelled hosting, for the following reasons.

First, Confederate monument removal bans provide white-dominated state governments the ability to favor the pro-Confederate message transmitted by a Confederate monument over competing messages. If not the purpose, the clear effect of banning Confederate monument removal is to advance the pro-Confederate viewpoint. Indeed, as was true of the notice posting requirement in *NIFLA*, viewpoint discrimination appears to be inherent in the design and structure of state bans on Confederate monument removal. A Confederate monument removal ban "is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression."[112]

In addition, as discussed above, compelled hosting of a Confederate monument affects the aggregate of a local political majority's collective speech when the aggregate of the that speech is a renunciation of the ideology of white supremacy. Monument removal bans are thus unconstitutional content-based regulations. As Justice Thomas explained in *NIFLA*, compelling an entity opposed to abortion to speak a state-mandated pro-abortion message by posting notices alerting clients where low-cost abortions could be obtained, "alter[s] the content of [the entity's] speech."[113] So also,

---

109 *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (no risk of government content discrimination by requirement that shopping malls permit members of the public to distribute leaflets and gather signatures on their shopping center property when beneficiaries of the right-of-entry requirement are determined on a content neutral basis).

110 *FAIR*, 547 U.S. at 63 (concluding that accommodating the military's message [by permitting military recruiters to enter law school property] does not affect the law school's speech, because the schools are not speaking when they host interviews and recruiting receptions; distinguishing *Hurley* on the basis that compelling a parade to include a gay-rights float does interfere with the parade organizers "autonomy to choose the content of its own message.").

111 *Id.* at 65.

112 Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

113 *Id.* at 2371.

forcing local residents to host a Confederate monument and its pro-white-supremacist message, when a political majority opposes white supremacy, also "alter[s] the content of [that community's residents'] speech." Compelled hosting of a Confederate monument forces a community's political majority to act in ways that conflict with its own deeply held beliefs "grounded in basic philosophical, ethical, or religious precepts, or all of these."[114]

Finally, there also is a high likelihood of mistaken endorsement when a community would have removed its Confederate monument but for being barred from doing so by a state ban on monument removal. Those viewing a community's Confederate monument cannot be expected to be aware that the community has been barred by state legislation from removing the monument. Just the opposite is more likely: the viewer will perceive that a community endorses the messaging transmitted by the monuments that it maintains. As discussed below, the Supreme Court made this point in *Pleasant Grove City v. Summum*,[115] concluding that monument viewers associate the government with its monument's message.[116] There can be little doubt that there is great risk that a viewer will mistakenly conclude that the community and its residents are willing endorsers of the pro-Confederate message contained in the monument even when the political majority within a locality finds the Confederate monument abhorrent, would gladly remove the monument if it could, but is compelled by state law to continue to host it.

In other words, if *PruneYard Shopping Center v. Robins*[117] is the paradigmatic example of compelled hosting that *is constitutional* because the shopping mall's own speech was not affected by permitting the public to solicit signatures on mall property, because the public will not likely conclude that the mall is endorsing the signature solicitation effort, and because there is no risk of government discrimination for or against a particular viewpoint by requiring the mall to open its property to the public in this way, then a state ban on removing Confederate monuments is the exact opposite. The reasoning in cases that permit compelled hosting—*PruneYard* (shopping malls) and *FAIR* (military recruiters at law schools)—strongly supports the view that state laws that coerce local communities into compelled hosting of Confederate monuments are unconstitutional. They require a locality's political majority to associate with speech with which it may disagree, hereby forcing that political majority to foster public adherence to a disagreeable ideological viewpoint preferred by government.

---

114 *Id.* at 2379 (Kennedy, J., concurring).

115 Pleasant Grove City v. Summum, 555 U.S. 460, 460 (2009).

116 *Id.*; *see* discussion *supra* note 94 and accompanying text.

117 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

The Court's First Amendment precedent and established principles show that such coercion is unconstitutional.[118]

C. *Doctrinal pathways for bringing suits to challenge the constitutionality of state monument removal bans*

Local government would seem to be the logical plaintiff to challenge the constitutionality of a ban on the removal of a Confederate monument. These monuments are on public land and their upkeep is financed by local tax revenues. Moreover, these removal bans thwart democratic accountability at the local level when they bar elected bodies such as city councils or mayors from carrying out the will of the community's political majority. In short, a local government is readily able to demonstrate how a monument removal ban disables a community from effectively communicating its public message of renouncing white supremacy. As shown above, forcing a locality to host a monument's pro-Confederate, white supremacist messaging not only "alter[s] the content" of the aggregate of the local community's speech: *it completely undermines that content*.[119]

Yet, local government is not a good choice to serve as a sole plaintiff alleging its own constitutional rights in suits challenging state monument removal bans. Courts most likely will read Supreme Court precedent to hold that local governments do not possess their own free speech constitutional rights enforceable against their state government.[120] As recently as 2009 the Supreme Court rejected the view that a municipality possesses its own constitutional rights that are enforceable against its own state. In *Ysursa v. Pocatello Education Association*, the court concluded that "a political subdivision, created by a state for the better ordering of government, has no privileges or immunities [of its own] *under the federal constitution* which it may invoke in opposition to the will of its creator."[121] Some scholars have argued that the Court's precedent leaves room for argument that a locality may be able to assert its own constitutional claims against its state government, but to date those argument have not borne fruit.[122]

---

118 Wooley v. Maynard, 430 U.S. 705, 715 (1977); Pacific Gas v. Elec. Co. & Pub. Utils. Com., 475 U.S. 1, 16 (1986).

119 *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361, 2371 (2018) and discussion *supra* notes 113–14 and accompanying text.

120 *See* discussion *supra* note 30 and accompanying text; *see also* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 3–17 (2012) (reviewing cases over the past one-hundred years and concluding that "the Hunter doctrine is alive and well in the lower federal and state courts, where it continues to bar and chill local constitutional enforcement").

121 Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363 (2009) (emphasis added).

122 "[N]o Supreme Court decision has recognized cities as protected by the First Amendment. . . ." Blank, *City Speech*, *supra* note 13, at 420. For a discussion of theoretical doctrinal paths scholars have

A far better doctrinal pathway is for a local government to join its local residents in a suit against the state that asserts the free speech constitutional rights of *the locality's political majority* that opposes the monument removal ban. It is well established that while a state has great authority to structure its relationships with its political subdivisions, states must exercise that power in ways that do not violate the constitutional rights of a locality's residents. The classic example of this is *Gomillion v. Lightfoot*.[123] In *Gomillion*, African American residents of Tuskegee, Alabama joined with the city of Tuskegee to allege that the Alabama legislature violated *their constitutional rights* when it redrew the city's boundaries in such a way as to deny plaintiffs the right to vote guaranteed by the Fifteenth Amendment. Finding that the boundary readjustment unconstitutionally denied plaintiffs the right to vote, the Court explained that while a state has plenary power to manipulate the affairs of its municipal corporations, the state's authority is restrained by the prohibitions of the Constitution. Courts are empowered to hear claims brought by a state's citizens alleging that a state's exercise of power over its municipalities has invaded constitutional rights guaranteed to the state's citizens. That is exactly what is involved when a state ban on monument removal is alleged to violate the free speech rights of a municipality's political majority. The removal ban is directed at its municipalities (because most monuments are owned by the municipality and are located on land controlled by towns and cities) but, as in *Gomillion v. Lightfoot*, state law violates residents' constitutional rights: Confederate monument removal bans unconstitutionally coerce majorities of local residents to support and be associated with pro-Confederate views that they and their local government find abhorrent. And as the Court held in *Gomillion*, "state power [to regulate a state's political subdivisions may not be] used as an instrument for circumventing a federally protected right."[124] Dissenting local residents are able to advance powerful arguments that monument removal bans violate both prongs of the First Amendment-based coerced speech doctrine discussed above.

First, removal bans are unconstitutional because they "alter the content" of the aggregate of the speech that political majorities insist that their democratically elected city councils or mayors communicate on their behalf.

---

advanced to permit a local government to assert its own constitutional rights against its state government, see Blank, *City Speech*, *supra* note 13, at 372–73 (asserting the possibility of cities finding traction to assert their own constitutional rights by emphasizing their status under state law as "municipal corporations"); *Id*. at 374–75 & nn. 50–52 (stating that the claim in the article for finding that a city possesses First Amendment speech rights enforceable against a state "joins recent scholarly attempts to envision cities as important constitutional actors who should be authorized to protect individual rights and raise various constitutional claims—even First Amendment ones—against their states" (citing authority).

123 Gomillion v. Lightfoot, 364 U.S. 339, 344–45 (1960).

124 *Id.* at 347.

City speech renouncing the pro-Confederate message is best understood as a democratically accountable vindication of the will of a majority of the community's residents who oppose white supremacy. Unwanted, forced hosting of a Confederate monument alters the content of the aggregate of the speech of a community's political majority that attempts to communicate a renunciation of white supremacy.[125]

In addition, a political majority of local residents is able to argue persuasively that state monument removal bans violate their free speech rights by coercing association with and forcing support for an ideology that a community's political majority finds abhorrent. Under existing Supreme Court precedent, compelling the majority of residents of a local community to maintain a Confederate monument on public land against its will constitutes unconstitutional compelled hosting:[126] (1) the purpose and effect of a monument removal ban is viewpoint discrimination by state government in favor of the pro-Confederate message transmitted by a Confederate monument;[127] (2) compelled hosting of a Confederate monument is an unlawful content regulation that undercuts a Southern community's own speech renouncing the ideology of white supremacy;[128] and (3) when a community chooses to remove its Confederate monument but is statutorily barred, a monument removal bans create a high likelihood that monument viewers will associate the local government and its residents with the monument's racist message and mistakenly conclude that the community endorses it.[129]

D. *Procedural pathways for local governments to assert their residents' legal rights*

To join with its residents to assert the free speech rights of its residents, a local government must demonstrate that it has standing. Litigants who have

---

125 *See, e.g.*, *supra* notes 113–14 and accompanying text for a discussion of coerced speech that is unconstitutional because it alters the content of the speaker's own speech.

126 *See. e.g.*, *supra* notes , 109–18 and accompanying text for a discussion of coerced speech that is unconstitutional because it requires compelled hosting of and a58ssociation with a detested ideology.

127 As was true in *NIFLA,* "viewpoint discrimination in inherent in the design and structure" of state bans on Confederate monument removal. Through these bans, a state government seeks to impose its own message in the place of the speech, thought, and expression of the majority in a locality that is forced to do the hosting. *See* Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

128 *See* discussion at *id.*, at 2371.

129 For a discussion that monument viewers associate the government with its monument's message whether the monument is government-commissioned or is a "privately financed and donated monument[] that the government accepts and displays to the public on government land," see Grove City v. Summum, 555 U.S. 460, 471–72 (2009).

suffered a concrete, redressable injury by the government action it challenges may rest a claim for relief on the legal rights or interests of third parties if (1) the third party's legal rights are inextricably bound up with the activity that the litigant wishes to pursue and (2) if there is some "genuine obstacle" to the third party's ability to assert his or her own legal rights. This is referred to as the third-party standing doctrine.[130]

Local governments suffer the requisite concrete injury to be granted third-party standing. Monument protection statutes interfere with a municipality's autonomy to decide how to use its public spaces and how to allocate its financial resources. In addition, under most monument protection statutes, municipalities risk civil or criminal prosecution and fines if they attempt to resist the state's coercion to support a Confederate monument's racist messaging by altering or disturbing a monument.

Moreover, the free speech rights of a local jurisdiction's residents are inextricably bound up with the activity that the litigant (a local government) wishes to pursue. A local government seeks third-party standing in order to advance its residents' claim that state legislation banning removal of the local jurisdiction's Confederate monument unconstitutionally coerces a political majority of its residents to engage in unwanted speech. This legal right of the residents is inextricably bound up with the activity that the municipality wishes to pursue, which is to be able to lawfully remove the offending Confederate monument.

Finally, courts likely will find that the obstacle prerequisite is satisfied. First, the Supreme Court has held that an obstacle to litigants vindicating their own legal rights is not always necessary.[131] Moreover, even where some obstacle requirement remains a factor, the slightest hindrance satisfies the third-party standing prerequisite of obstacle. As the Supreme Court has explained, identifying some hindrance to the ability of the third party to litigate his or her own legal rights is a prudential, not a constitutional, requirement. Even very modest hindrances are sufficient to meet the obstacle requirement when, on balance, the adverse impact on third-party interests from the challenged government action is great and the litigant who is before the court will adequately represent the interests of the third-party who is not before the court.[132] In addition, there easily could be privacy and safety

---

130 *See* Singleton v. Wulff, 428 U.S. 106, 114–16 (1976). *Accord* Craig v. Boren, 429 U.S. 190, 196 (1976); Eisenstadt v. Baird, 405 U.S. 438, 443–44 (1972).

131 *See*, *e.g.*, Caplin & Drysdale v. United States, 491 U.S. 617, 623 n. 3 (1989) (attorney granted third-party standing to assert client's Sixth Amendment right in the absence of any obstacle to the client raising the issue).

132 *See*, *e.g.*, *Singleton*, 428 U.S. at 117 (obstacle found when third-party was a pregnant woman; even though woman could have litigated her own right to obtain an abortion the pregnant woman's absence from court may have been explained "by a desire to protect the . . . privacy of her decision from the publicity of a court suit"); *Craig*, 429 U.S. at 194, 196 (requisite obstacle found in case litigating the Equal

concerns hindering residents' willingness to become a named plaintiff in litigation seeking authority for a local government to remove a Confederate monument, especially given the current rise in white nationalism and the spread of far-right white extremist ideology and violence.[133] The Court has found that concerns over the physical security of individuals who might need to come forward as named plaintiffs if third-party standing is denied an organization represents an obstacle justifying the granting of third-party standing.[134]

The procedural posture of a municipality's suit against the state to litigate the infringement of the First Amendment rights of the political majority of the city's residents would be strengthened by adding several local residents as named plaintiffs, as was done in *Gomillion v. Lightfoot,* discussed above. There is considerable precedent that a municipality may sue a state alleging infringement of the constitutional rights of its residents when residents themselves are parties to the litigation. This was the situation in *Washington v. Seattle School District No. 1*, a case where the Supreme Court held that a political subdivision of the state (a local school board) could raise the equal protection rights of minority students to challenge a state law banning bussing to achieve racial integration of the state's schools. Similarly, in *Romer v. Evans*, individuals and municipalities joined to challenge the constitutionality of state law discriminating against gays and lesbians, and the Supreme Court held that the municipalities could assert the constitutional rights of their residents.[135]

Protection rights of males below the age of twenty-one who claimed being denied the same right to purchase alcohol as women who were between the ages of eighteen and twenty-one even though males could have themselves sued where on balance the prudential objectives on third-party standing, are not well served by delay and where the litigant before the court has presented the applicable constitutional questions vigorously and "cogently"); *Eisenstadt*, 405 U.S. at 443–46 (holding that the impact of the governmental action is the critical factor in third-party standing cases and here a distributor of vaginal foam had standing to assert the rights of unmarried persons denied access to contraceptives because their ability to obtain them will be materially impaired by enforcement of the statute).

133 *See, e.g.*, Neil MacFarquhar, *O.K. Hand Sign Is a Hate Symbol, Anti-Defamation League Says*, N.Y. TIMES (Dec. 15, 2019), https://www.nytimes.com/2019/09/26/us/white-supremacy-symbols.html (discussing findings that "a more fluid use of [white extremist] symbols ha[s] accelerated since the 1980s")

134 *See* NAACP v. Alabama, 357 U.S. 449, 462–63 (1958) (NAACP member's asserted privacy right to withhold their connection to the NAACP could not be effectively vindicated except through an appropriate representative before the Court).

135 Romer v. Evans, 517 U.S. 620, 625 (1996); *see also* Papasan v. Allain, 478 U.S. 265, 268, 291 (1986) (local school officials could assert a claim on behalf of the school children that litigation was not barred by the Constitution's Eleventh Amendment when the local officials and school children joined to challenge a state law).

E. *The government speech doctrine is no bar to suits against the state by local residents that claim that monument removal bans constitute unconstitutional compelled speech*

Assuming that a municipality, alone or joined by some of its residents, is granted standing to assert the free speech rights of its residents to oppose state bans on removal of a Confederate monument, the question remains whether the government speech doctrine precludes the argument that a state monument removal ban violates the municipal residents' free speech rights. The core of the residents' free speech claim is that a state ban on removal of a municipality's Confederate monument unconstitutionally forces local residents to continue to support, and be associated with, the offensive pro-Confederate messaging transmitted by a Confederate monument that is located on public property of the plaintiff residents' city or town.[136] No doubt, state governments would attempt to counter this free speech claim by residents by asserting that Confederate monuments constitute the *state's own government speech* now that the state has taken control of the monuments by banning their removal. *If* the monument's messaging now constitutes the state's own government speech, the state's choice not to permit removal of the monument would not unconstitutionally coerce the private speech of a municipalities' residents. *Pleasant Grove* would require that result: a decision by a state government not to permit removal of a monument would not violate the municipal residents' First Amendment free speech rights *if* the monument's messaging constitutes the state government's own government speech.[137]

In short, litigation that a municipally might bring asserting its residents' free speech claims to challenge a monument removal statute might well center on the question whether the state, by banning a local government from removing a Confederate monument that is owned by that local government and is located on its public space, may now claim that the expressive content of that Confederate monument represents the *state's own government speech*. The evolving government speech doctrine should reject a state's claim that its monument removal ban transfers the locus of government speech from the local jurisdiction that owns the monument and the land where the monument is located to the state that has now regulated the monument's removal.

The expressive content of a monument belongs to that unit of government that owns the monument and the land on which the monument is located because onlookers will likely conclude that this is government that is voluntarily lending its imprimatur to the monument's message. Onlookers

---

136 *See* discussion *supra* notes 113–14 and accompanying text.

137 Pleasant Grove City v. Summum, 555 U.S. 460, 460, 464, 472 (2009).

will not likely connect the state to the expressive content of a monument whose removal is banned by state law when the monument is located within the boundaries of a town or city and situated on the public space owned, managed, and controlled by the municipality. As to such monuments, it is unlikely that onlookers will conclude that the state, rather than the municipality, is the entity that is deciding to keep the Confederate monument in place.

The Supreme Court has explained that the public associates a monument's message with the governing entity that owns and manages the space where the monument is located and links the monument's message to that government entity. For example, in *Pleasant Grove City v. Summum*, the Court held that "persons who observe . . . monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf."[138] In *Pleasant Grove*, there was

> little chance that observers will fail to appreciate the identity of the speaker [there the City because] [p]ublic parks are often closely identified in the public mind with the government unit that owns the land. City parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world.[139]

As the Court emphasized, "[g]overnments have long used monuments to speak to the public [through monuments]."[140]

For Confederate monuments that are subject to a state ban on removal, but that are located in a town's courthouse lawn, downtown park, or town square, it is likely that the public will misappropriate blame by holding local government accountable for the content of the speech transmitted by a monument, notwithstanding the reality that a local government would remove a monument if it lawfully could do so. "[P]ersons who observe [monuments on city property] routinely—and reasonably—interpret them as conveying some message on the [city's] behalf."[141]

It is critical to the efficacy of the government speech doctrine that the state should not be permitted to claim a monument's expressive activity as its own government speech when, as a practical matter, the public perceives that local government, and not the state, is the government entity that is accountable (i.e., *responsible*) for the keeping the Confederate monument in place. In *Pleasant Grove*, the Court emphasized the importance of

---

138 *Id.* at 471.

139 *Id.* at 471–72.

140 *Id.* at 470.

141 *Id.* at 471.

accountability. Once government activity is denoted as "government speech," there is no valid constitutional free speech claim that a citizen can lodge against the government whose speech content a citizen finds offensive. Instead, restraint on government speech rests exclusively on government being "accountable to the electorate and the political process." As the Court explained, "[i]f the citizenry objects [to government speech], newly elected officials later could espouse some different or contrary position."[142] The government speech doctrine is justified largely because the electoral process serves as a meaningful check on governmental expression. "Democracy . . . ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message."[143]

For the political process to operate effectively as a check on unwanted government speech, the public must have a reasonable ability to direct political pressure at that government entity that the public reasonably concludes controls the content of government speech that citizens find objectionable. In the public mind, monuments located in spaces owned and managed by local government represent the government speech of that locality even when it is state law that bans removal. For government speech to remain accountable to the electorate through the political process, it is thus necessary that constitutional law hold that a monument represents the speech of that government entity that owns the monument and owns and manages the land on which the monument is located.

III. CONCLUSION

In short, a state monument removal ban may transfer *political control* of a Confederate monument's pro-Confederate message to the state government and away from the local government that owns the monument and on whose property the monument is located. But this shift in political control does not result in the Confederate monument's expressive content becoming the state government's own government speech, thus immunizing the state from a constitutional challenge by a political majority in a locality that opposes coerced hosting of a Confederate monument located in its community on local land. Monuments remain the government speech of the local government that owns the monument and that controls the land where the monument is located. This assures political accountability at the local level. A locality's political majority then is provided a meaningful

142 Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

143 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 575 (2005).

opportunity to bring political pressure on its local government to support the will of a locality's political majority by joining a challenge that alleges that the state monument removal ban violates the local residents' First Amendment free speech rights. States that are sued will not be permitted to rely on the government speech doctrine to claim immunity from such citizen free speech challenges. Such free-speech-based suits against state government should prevail on the merits because under well-established Constitutional free speech doctrine, Confederate removal bans constitute unconstitutional coerced speech by forcing a locality's political majority from becoming "an instrument for fostering public adherence to [the state government's] ideological point of view. . . ."[144]

144 Wooley v. Maynard, 430 U.S. 705, 713, 715 (1977).